Supreme Court, U.S.
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Nos. 98-744 and 98-773

In the

Supreme Court of the United States

October Term, 1998

Consolidated Freightways Corporation
of Delaware, Inc., and International
Brotherhood of Teamsters, Local 24,
Petitioners,

v.

Dennis W. Schoonover,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

MEMORANDUM IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals apply the proper rule of law in reviewing the verdict of a jury that was properly instructed that the standard of liability for breach of the duty of fair representation was whether the union's conduct was arbitrary, discriminatory or in bad faith, and whether the breach tainted the outcome of the arbitration proceeding?

2. Does the statute of limitations for a hybrid suit for breach of fair representation and violation of the collective bargaining agreement begin to run before the arbitral body issues its decision, as soon as it states what the result of the hearing is going to be?

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MEMORANDUM IN OPPOSITION

Petitioners here seek review of an appellate decision that upheld the verdict of a properly instructed jury that found petitioners liable for breach of the duty of fair representation {"DFR") and breach of contract, respectively. Petitioners do not take issue with the jury instructions, and they did not take issue with them below. Thus, the court of appeals properly framed the issue: "This is a fact-intensive case in which the applicable legal standards are well settled." Pet. App. 2a. The court below recognized the single issue presented and noted that Petitioner's "challenge the sufficiency of the evidence supporting" the jury's verdict, Pet.App.2a., in which the only issue is whether "the evidence against Schoonover was so overwhelming that no one could reasonably find in his favor." Id. 4a.

Rather than taking issue with the standard of law applied pursuant to the jury instructions, petitioners attack the opinion below because of the use of the word "could" by the Sixth Circuit. In fact, however, the Court was simply pointing out what a reasonable jury could have properly concluded in light of the correct viewing of the factual record. That is, a jury could properly have found facts amounting to a breach under well-settled standards of law. Each and every passage in the court of appeals' opinion that petitioners' cite as supposedly being in conflict with the decisions of other courts of appeals did not in fact cite some controversial legal standard, but simply indicated that the jury could have relied on a particular fact, among others, and could properly have come to a particular conclusion, in finding a breach of DFR or contract. Thus, the questions on which petitioners ask the Court to grant certiorari simply are not presented here.

In order to see why this is so, we begin by recounting the facts, not in the light most favorable to the union and

employer as the petitions do, but as they were presented to the jury, on which their verdict was based. We then show how the court of appeals analyzed the record and the jury verdict, and why it affirmed. Finally, we demonstrate, in light of this Statement, that the questions are not properly presented, that the supposed conflict among the circuits does not exist, and that certiorari should, consequently, be denied.

STATEMENT

A. Facts

Respondent Dennis Schoonover was employed by Consolidated Freightways ("CF"), the petitioner in No. 98-773. from 1970 until his was discharged in 1987. As recounted by the court of appeals, the circumstances of respondent's discharge were as follows:

> [Respondent] was a truck driver for [Petitioner]. He was discharged for intentionally destroying company property, specifically a brake pedal of the tractor he was driving to Milwaukee. On the day in question, the pedal broke off within twenty-five minutes of [Respondent's] departure from the terminal. [Petitioner] claimed that [Respondent] broke the pedal in retaliation against his supervisors for making him drive a "piece of junk." His supervisor believed that he had use a long tire iron (or "bud bar") to pry the pedal off so that he could drive a different rig to Milwaukee. They reached this conclusion by prying the pedal off another tractor in this manner. [Respondent], of the other hand, vehemently denied breaking the pedal. According to him, when he went to put on the brakes at the first major intersection on his route, the pedal

> was lying on the floorboard in two pieces. This story was corroborated by another truck driver who saw [Respondent] perform an emergency stop at this intersection, which would be consistent with a normal brake failure. [Respondent] speculated that the brake tie-down mechanism, which holds the pedal down while the driver checks the brake system, could have caused the pedal to break. Purportedly, the tie-down could have lodged under the pedal, causing it to snap off when a driver depressed the brake, or it may have caused cracks in the die-cast metal by repeatedly allowing the pedal to snap back into place after a drive disengaged it.
>
> Petition for Writ of Certiorari, Appendix A, 2a-3a.

Respondent filed a grievance over his discharge with his collective bargaining representative, Teamsters Local 24, which is the petitioner in No. 98-744. In order to dissuade Local 24 from pursuing respondent's grievance, CF gave Local 24 the report of an expert that purported to support the discharge, and conducted a demonstration that purported to show how respondent must have intentionally broken the pedal in order to hurt CF's business. At trial, however, respondent was able to demonstrate that the expert had been asked only to give an opinion about whether the pedal was broken by upward force which, the employer later argued, could have resulted from an alleged crow bar, but that the expert was steered away from conducting tests that he had suggested that could have demonstrated, among other things, weakness in the pedal, because that would have undercut the discharge; he also showed that the demonstration was phony. Respondent proved that CF was able to break the pedal only by installing **different** equipment than that which was on respondent's truck.

Additionally, a videotape obtained from CF in discovery showed that CF supervisors had tried for two straight hours to break the pedal in the way in which respondent was supposed to have done, but had been completely unable to do it, until they hit on the trick of using different equipment. Respondent also established at trial that the cost of fixing the brake pedal was only a few dollars, undercutting CF's theory that respondent broke it in order to get back at the company for some imagined slight.

As against petitioner Local 24, the theory of respondent's case was that the union simply accepted the employer's story and rejected respondent's story without much thought and without investigation, and then proceeded to do no more than go through the perfunctory motions in presenting respondent's case in arbitration. In this regard, it is important to note that this is **not** a case in which a union made a deliberate decision not to proceed with a grievance, and defends its decision in that regard on the basis of a reasoned analysis of the case. Rather, in this case the union took the case before a union-employer joint committee but did no more than permit the respondent to say he didn't do it and leave it to the committee to decide what to believe.

Reading the petitions, one would think that respondent's claim was simply that the union decided not to hire an expert to examine the accident and determine whether respondent could possibly not have been at fault. In fact, however, this was but one of numerous deficiencies in the union's handling of the grievance to which respondent pointed in arguing that the union pursued his grievance in a grudging, perfunctory fashion. Among these flaws were the following:

-— the union did not even talk to CF's expert; had

it done so, even a telephone call would have revealed that CF directed its expert not to consider possible causes of the accident that would have exonerated respondent, even though he suggested such causes to CF;

-— the union made no effort to confirm the company's version of the facts by conducting its own demonstrations with the brake pedal; had it done so it would have learned that it was virtually impossible for the pedal to have broken in the way that CF had accused respondent of doing;

— the union made no demand on CF for relevant materials, as it had the power to do;

-— the union allowed the employer to use a brake pedal from a different kind of truck as a model at the hearing;

— the union made no effort to determine the accuracy of the company's claim that the truck's manufacturer had no reports of similar fractures; had it done so it would have learned that the manufacturer doesn't keep records in a manner that shows whether brake pedals fractured, but that a more general category of "brake replacements" had numerous entries, without showing the reasons for the replacement;

— the union did not consider or present evidence about problems caused by the specific variant of brake pedal used on respondent's truck, even though the truck which was from a different manufacturer than most of CF's trucks, and the pedal type and accompanying equipment were different that most of that manufacturer's trucks;

-— the union did not talk to or present evidence from other drivers identified by respondent who knew that similar pedals owned by the company unintentionally fractured in the same manner as Schoonover's; these drivers' trial testimony was devastating to the company's claim of

just cause for the discharge;

— the union did not investigate structural defects in the actual broken pedal;

— the union did not investigate or question the effect of a tie down mechanism used exclusively by CF and which their own expert testified could have been a cause of the break in Schoonover's pedal;

-— and numerous other errors, the discussion of which consumed 14 pages in respondent's brief in the court of appeals (a copy has been lodged with the Clerk).

The grievance was presented to a joint union-employer committee on November 18, 1987. The employer's representative presented numerous documents, laboratory reports, and statements from employees and other witnesses, and conducted a demonstration using a "mock-up" brake pedal (from a different truck manufacturer, as noted above but ignored at the arbitration). The union's case consisted of reading statements from respondent and the miswritten statement of another driver, oral statements by respondent, plus the complaint that the company's expert testimony should be disregarded because the union did not have any experts. After a short recess, the chairman of the committee indicated that the committee was not going to grant the grievance, and that an official notification would be sent to the parties reciting the committee's findings. Indeed, the committee's rules specifically provide that decisions must be issued in writing. On November 24, 1987, respondent learned from petitioner Local 24 that this official denial of the grievance had been issued.

B. Proceedings Below.

Respondent filed his complaint in the United States District Court for the Northern District of Ohio on May 20,

1988, which was more than six months after November 18, 1987, but less than six months after November 24, 1987. At the conclusion of respondent's case at his first trial in December 1992, the district court dismissed the action as untimely, applying the six-month statute of limitations adopted by this Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

Respondent appealed, contending that, just as he could not have filed his hybrid claim before receiving a copy of the joint committee decision rejecting his grievance, so did the statute of limitations not begin to run until that time. The court of appeals agreed, in a unanimous opinion authored by Circuit Judge Boggs. It began by noting the unanimity among the circuits in holding that a cause of action accrues when suit could first have been maintained, and that a plaintiff cannot bring a hybrid suit until both of the following have occurred — the arbitration decision has been issued, and the plaintiff learns (or should have learned) of the decision. CF Pet. App. 15a-16a. The question, therefore, is whether an oral indication of the intended decision is the "decision" for statute of limitations purposes, or whether the decision is not issued until it is written. Looking both to the rules of the Teamster joint committee in question, and the Ohio arbitration statute, which is based on the Uniform Arbitration Act, the court concluded that to be official an arbitration award must be in writing. *Id.* *17a-18a.* Moreover, given the need for a written record of the basis for decision, in order to be able to litigate a DFR case (or any other case challenging an arbitral determination), the court concluded that the only correct approach was to expect litigants to wait for the written decision before coming to court. *Id.* 18a-19a. Accordingly, respondent had properly sued within six months of the written decision, and the timeliness dismissal was reversed.

Rather than seeking review of this decision, petitioners

returned to the district court and the case proceeded to trial. With respect to the DFR, the jury was instructed that it could find a breach only if petitioner Local 24's "conduct in representing Schoonover was arbitrary, discriminatory or in bad faith." The court specifically instructed that "simple negligence by the Union or errors in judgment" were not sufficient to breach the DFR, but that arbitrary conduct could be found "if . . . the union's behavior is so far outside a wide range of reasonableness as to be irrational," or if "a union handles a grievance in a perfunctory manner with caprice or without rational explanation." The instructions further directed that liability could be found only if petitioner Local 24's failure to fairly represent "was of such a character as to have had the probable result of causing an erroneous outcome at the arbitration stage," or, in other words, that "the Union's breach of its [DFR] tainted and undermined the arbitration process; thereby foreclosing the Plaintiff from a fair consideration of his grievance by the arbitrators." In other words, the trial judge instructed, respondent "must demonstrate by a preponderance of the evidence that the Union's breach was so significant that the grievance process was seriously flawed and the arbitration decision tainted, such that a different result would have been rendered but for the Union's arbitrary, discriminatory or bad faith actions." Thus, indisputably correctly, instructed, the jury rendered a verdict for respondent.

Petitioners then appealed. The appellate briefs, on both sides, were devoted largely to an analysis of the record, with petitioners, presenting the facts in a light most favorable to the petitioners just as they do in their petitions in this Court, contending that there was not sufficient evidence in the record to sustain the verdict on the questions of whether the union had breached its DFR and whether the union's breach had tainted the outcome of the joint committee's deliberations, and

respondent arguing just as forcefully that there was ample evidence to support the verdict in both respects. Petitioners did not contend below that the trial court had committed any error of law or given any faulty jury instructions, apart from its failure to appreciate that there simply wasn't enough evidence to sustain the verdict. Their questions presented were all directed to the question of whether the record was adequate to sustain the verdict.

In an opinion by Circuit Judge Merritt, joined by Circuit Judge Boggs, The court of appeals upheld the verdict in all respects. Like the parties, the court below did not treat the case as one presenting difficult of controversial questions of law; instead, it said, the petitioners "challenge the sufficiency of the evidence supporting" the jury's verdict, Pet App. 2a, in which the only issue was whether "the evidence against Schoonover was so overwhelming that no one could reasonably find in his favor." *Id.* 4a. In order to decide that question, it recounted the various forms of evidence that Schoonover had presented to show "that his supervisors . . . set him up and then fabricated evidence to assure his dismissal," *id.* 4a-5a, and "that the union never took his grievance seriously and thus provided him inadequate representation at his grievance committee hearing." *Id.* 5a-6a. The jury's findings by special verdict that petitioner CF has breached its contract, that petitioner Local had breached its DFR, and that this breach "tainted the hearing in such a way that the arbitration committee would have reached a different result without the breach, . . . specifically trace the requirements for liability in a hybrid 301 case." *Id.* 6a.

The court then concluded that the evidence was sufficient to support findings on each of these questions. The court recounted several failings by petitioner union which, cumulatively, "would justify the jury's finding that the union's

representation of Schoonover was 'arbitrary, discriminatory, perfunctory, or in bad faith," and that without these failings, "it is certainly conceivable that the grievance committee would have **decided** Schoonover's grievance differently." *Id.* 7a. Given the high standard for overturning a jury verdict, these conclusions required affirmance.

Judge Kennedy dissented, but like the majority she treated the case as a factual one and not a legal one. She did not accuse the majority of committing any errors of law, not to speak of departing from the precedents of other circuits or of this court. She simply concluded that there was not sufficient evidence in the record to sustain the verdict.

Petitioners then sought rehearing and rehearing en banc, but no judge requested a vote on en banc consideration.

REASONS FOR DENYING THE WRIT

The Decision Below Does Not Conflict With Any Decision of This Court or Any Other Circuit, and Indeed the Passages That Allegedly Reflect Legal Error Are Simply Taken out of the Context of Finding No Error in a Jury Verdict

Between them, the two petitioners ask the Court to grant certiorari in this case on three separate questions of law that are said to be presented here. Both petitioners contend that the Sixth Circuit applied the wrong standard of union culpability for the finding a DFR breach, charging that the court below accepted a "negligence" or "legal malpractice" standard. In addition, the union petitioner charges the court with allowing a finding of liability based only on a mere **possibility** that the DFR breach tainted the arbitral outcome, and the employer petitioner

contends that the suit was untimely because it was brought less than six months after the written decision but more than six months after the oral announcement of which the decision would be.

As we explain below, of these three questions, only the latter is genuinely presented. The court did not apply a negligence standard, but upheld the verdict based on the perfunctory processing of the grievance (that is, that the union was only going through the motions), and it did not uphold a standard of "possible taint" but simply said that the evidence was enough that taint could have been found. In short, the offending lines on which petitioners seize are simply taken out of context. The legal questions that petitioners' able counsel endeavor to create out of a substantial evidence appeal simply are not presented here. The limitations question is here, but the holding below is not in conflict with other lower court holdings or with any decision of this Court, and indeed, it is undoubtedly correct and thus not worthy of a grant of certiorari.

1. Both petitioners contend that the court below held the union to a standard of simple negligence as a sufficient basis for finding a breach of the DFR. That is simply not what happened below. The Sixth Circuit at no time mentions the word negligence or in any way suggests a negligence standard should be used. To the contrary, the Court relied on the the correct standard for the union breach as the DFR, traditionally followed in the Sixth circuit and elsewhere, which is whether the representation "was 'arbitrary, discriminatory, perfunctory, or in bad faith.' *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1355 (6th Circuit 1989); See also *Vaca v. Sipes*, 386 U.S. 171, 190, (1967)." Pet. App. 7a. The jury in this case was properly instructed on the "arbitrary, discriminatory or bad faith" standard enunciated by this Court in many cases beginning with

Vaca v. Sipes, 386 U.S. 171 (1967). The instructions included two explanations of the "arbitrary" portion of the standard -- (1) that "arbitrary" could include merely "perfunctory" grievance handling that amounts to merely going through the motions of processing the grievance without ever taking the matter seriously, *Vaca, supra*, 386 U.S. at 190, 191, and (2) that conduct so far beyond the bounds of reasonableness as to be irrational is arbitrary. *ALPA v. O'Neill*, 499 U.S. 65 (1991).

Each of the two petitioners relies on a different part of the court of appeals' decision to show that it relied on a negligence standard. Petitioner CF relies solely on the dissent for the proposition that a negligence standard was applied below. Thus, in the argument portion of its brief, this petitioner states, "The dissent . . . fairly stated the facts and rationally analyzed the evidence in concluding that, at the very most, Local 24's conduct was negligent." CF Pet. 13. But the majority did not invoke a negligence standard, and even Judge Kennedy did not accuse the majority of invoking such a standard; she simply expressed her opinion that the evidence was sufficient only to support a finding of negligence and that this was not legally sufficient. Absent reliance by the majority on a negligence or malpractice standard, certiorari should not be granted to decide whether that is the proper standard simply because one of the three judges below thought that that was all the evidence showed.[1]

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[1] At pages 14-15, of its petition, CF also takes the court below to task for using the wrong standard for deciding whether there was enough evidence to support the jury's verdict. Petitioner advances the curious proposition that "the standard for review of a jury verdict is de novo," which it contends that the Sixth Circuit has used in other cases. We do not believe that

Petitioner Local 24, for its part, seizes on the use of the word "mistakes" in the majority opinion to show that the majority "applied what amounts to a legal malpractice standard of negligence," Pet. 7, and then argues that the decision below conflicts with *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1986), which squarely rejects the legal malpractice standard. Pet. 8. But the words "malpractice" and "negligence" do not appear in the majority opinion, and, indeed, the jury was instructed that mere negligence or errors of judgment were not enough to warrant liability. The offending sentence on which the Local 24 petition relies is the following: "Without these mistakes, it is certainly conceivable that the grievance committee would have decided Schoonover's grievance differently." Pet. App. 7a. The preceding sentence, however, stated that Schoonover's challenges to the union's conduct "are all substantial reasons which, in combination, would justify the jury's finding that the union's representation of Schoonover was 'arbitrary, discriminatory, perfunctory or in bad faith." *Id.* After all, Schoonover's contention, as the majority properly understood it, was that instead of taking his grievance seriously, the local just went through the motions of representing him; that is what the majority found to be supported by the evidence in the record.

Moreover, perfunctory processing of a grievance is precisely what this Court in *Vaca* said a union cannot do. If the union thinks the grievance isn't worth pursuing, it should say so

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this is the Sixth Circuit standard. In any event, the question of the proper standard for review of a jury verdict was not presented to the court of appeals; it is not fairly included in the question presented; and thus it is no basis for a grant of certiorari in this case.

and then its decision stands or falls based on whether its evaluation is so far outside the bounds of reasonableness as to be irrational; but if it takes the case to arbitration, it cannot simply go through the motions. That is the standard on which the jury was instructed — without objection from the respondents — and the Court should not grant certiorari based on the proposition that the court below departed from that standard.

Petitioner Local 24 apparently raises as a separate question whether its "failure to retain an expert" can be "so wholly irrational" as to breach the DFR; according to the union, this is a merely tactical decision in the conduct of a grievance trial that should not be the basis for imposing liability. Pet. 9-10. But Local 24's non-use of an expert was simply one of several defects in its handling of the grievance that supported Schoonover's contention that petitioner was only going through the motions with respect to his grievance. Good lawyers that they are, petitioner's counsel seeks to hold each individual reason up to the light and ask rhetorically whether this reason alone can constitute a breach. But the issue is not whether this individual act breached the DFR, but whether the jury was entitled to find, based on a long series of acts of which this is only one, that petitioner was only going through the motions with respect to his grievance. Indeed the court below referred to the "combination" of "substantial reasons" which "justify the jury's finding." Pet. App. 7a. The court properly held that there was enough evidence to support this aspect of the special verdict, and the question of whether this individual failing breaches the DFR is simply not presented in this case.

2. Petitioner Local 24 also accuses the court below of allowing a jury to find it liable because a breach of the DFR "might have" affected the outcome of the arbitation, instead of

"rigorous proof that taint **actually occurred**." Pet. 11-12 (emphasis in original). Petitioner bases this accusation on the same sentence as its first point: "Without these mistakes, it is certainly conceivable that the grievance committee would have decided Schoonover's grievance differently." Pet. App. 7a. But in this sentence, the court of appeals was not invoking the standard for the jury's consideration of the issue of taint; it was invoking the deferential standard for its review of the jury's special verdict on the issue of taint. The jury was properly instructed that it had to find actual taint; once the jury so found, its verdict had to be upheld so long as there was evidence in the record sufficient to support a finding of taint. That is all the court below meant when it used the words "certainly conceivable," and this question forms no basis for certiorari here.

3. Finally, petitioner CF asks the Court to grant review to decide whether the statute of limitations in a hybrid case accrues when the arbitral body states orally what how it intends to decide the grievance, or only when it issues its written decision and the employee learns of that decision. Petitioner contends that other circuits have held contrary to the decision below, but it does not cite any case that is actually in conflict with the decision below, nor are we aware of any.

Thus, *Samples v. Ryder Truck Lines*, 755 F.2d 881, 887 n.7 (11th Cir. 1985), and *Dowty v. Pioneer World Elec. Co-op.*, 770 F.2d 52, 56 (6th Cir. 1985), the arbitration decisions had in fact been issued in writing. In *Dowty* the court held that the employee's suit was untimely because it was not filed within six months of the date when the written decision was read to him; although he had not received a copy, he knew it had been issued. In *Samples* the decision was favorable to him, but the suit was not filed within six months of the employee's learning

that the union was not going to seek enforcement of the award. The only reference to the time for suing to overturn an arbitration award was in a footnote explaining that the six months runs from the time when the employee learns of the "award" - that is, in context, of the written decision. And *Metz v. Tootsie Roll Industries*, 715 F.2d 299 (7th Cir. 1983), did not involve an arbitration decision at all — the union's breach there was in failing to take the grievance to arbitration, and the court held that the statute began to run when the member knew or should have known of that failing. Thus, petitioner has not cited a single decision of any lower court that conflicts with the decision below — indeed, the petition takes the court below to task for failing to cite any precedent on the issue. But in the absence of any conflict among the lower courts on this issue, there is no reason for the Court to grant review here.

Moreover, the decision below was plainly right. This is true in part because, as the court below noted, the rules of the Ohio Joint State Grievance Committee require decisions to be reduced to writing and signed by both sides. CF Pet. App. 17a. The Ohio arbitration statute, drawn as it is from the Uniform Arbitration Act, requires a written decision. If someone is to challenge an arbitral decision, surely it makes sense to wait to see what the decision says before coming to court, because the text of the decision may affect the viability of the legal challenge.

Petitioner CF seems to suggest that a member suing for breach of the DFR in an arbitration hearing could appeal to the federal courts before the written decision is issued, but that is entirely unlikely. It is as if a federal judge announced that he was going to grant summary judgment for one side or the other, and the losing side filed its notice of appeal before the written summary judgment was issued. Just as the time to appeal does

not begin to run until the written judgment is issued, so the time to sue over breach of the DFR in a grievance proceeding leading to arbitration does not begin to run until the written arbitration decision is issued and member learns of its issuance. The decision of the court below on this point is wholly noncontroversial and not a good reason to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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